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No. 836

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Supreme Court of the United States

OCTOBER TERM, 1961

W.M.C.A., Inc., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

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W.M.C.A., Inc., *et al.*,

Appellants,

v.

Caroline K. Simon, *et al.*,

Appellees.

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Appellees Attorney General and Secretary of State have moved to dismiss or affirm. Appellees Abe Stark, Denis J. Mahon, James Power, John R. Crews and Thomas Mallee and Appellee Eugene Nickerson (successor in office to Appellee A. Holly Patterson) have filed briefs supporting Appellants' position. Appellees Owen M. Quinn and William J. Leonard have not responded to Appellants' Jurisdictional Statement except that an appearance has been noted for Appellee Owen M. Quinn.

We respectfully submit that it is patently fallacious to contend, as have Appellees Attorney General and Secretary of State (Motion to Dismiss or Affirm, p. 5) that the court below satisfied the mandate later announced in *Baker* by reviewing the complaint on its merits. To the extent that the lower court passed upon the complaint, it

determined its sufficiency by applying an erroneous standard—*i.e.*, that the Fourteenth Amendment and the federal courts would afford no protection against malapportionment designed to discriminate against urban voters (Jurisd. St. 16a-17a, 28a). Appellees Attorney General and Secretary of State cannot sincerely be urging upon this Court that any cursory review of the sufficiency of a complaint—even a review under a basically erroneous standard—satisfies the mandate of the *Baker* case. Such a contention entirely substitutes form for substance and, if sustained, would effectively deprive Appellants of a valid hearing on the merits of their cause.

Conclusion

It is respectfully urged that this Court should reverse the decision below and remand the case for reconsideration in the light of *Baker* v. *Carr*, Cf., *Scholle* v. *Secretary of State*, 360 Mich. 1, vacated, No. 22, Oct. Term 1961 April 23, 1962).

Respectfully submitted,

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May 16, 1962.